

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE DELAWARE)	
PUBLIC SERVICE COMMISSION’S)	
JURISDICTION OVER ELECTRIC VEHICLE)	PSC DOCKET NO. 19-0377
CHARGING STATIONS AND SERVICE)	
PROVIDERS)	
(FILED JUNE 11, 2019))	

Order No. 9516

I. BACKGROUND

1. On June 18, 2019, by PSC Order No. 9418, the Delaware Public Service Commission (“Commission” or “PSC”) initiated this docket by its finding “that deregulation by the Commission of electric vehicle charging stations and service providers may be in the public interest and that, consequently, the Commission believes it should consider deregulating electric vehicles charging stations and electric vehicle service providers.”

2. PSC Order No. 9418, *inter alia*, designated Glenn Kenton as Hearing Examiner in this docket “to have a full and complete record on the issues identified in 26 *Del. C.* § 201(d)(5) and to file with the Commission my proposed findings and recommendations.”

3. In that connection, Hearing Examiner Kenton was directed “to schedule and conduct, upon due notice, such public comment sessions and evidentiary hearings, as may be necessary, to have a full and complete record on the issues identified in 26 *Del. C.* § 201 (d) *et. seq.*” Thereafter, Hearing Examiner Kenton was directed to “file with the Commission his proposed findings and recommendations on the issue of the appropriateness of the Commission considering deregulating electric vehicles and charging stations.”

4. On November 20, 2019, Hearing Examiner Kenton issued his Findings and Recommendations, a copy of which is attached hereto as Exhibit I.

II. DECISION

5. We have carefully considered the Findings and Recommendations of the Hearing Examiner in this docket and adopt them.

**NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE
VOTE OF NO FEWER THAN THREE COMMISSIONERS:**

8. **WHEREAS**, dated this 12th day of December 2019.

9. The following Findings and Recommendations of the Hearing Examiner in this docket dated November 20, 2019 provided as follows are adopted:

10. The Commission determines that Electric Vehicle Charging Station Owners and Operators are not a “public utility” pursuant to the Public Utilities Act by adopting the following language:

“The ownership, control, operation, or management of a facility that supplies electricity to the public only for use to charge plug-in electric vehicles does not make the entity, corporation or person a public utility under 26 *Del. C.* § 102 solely because of that ownership, control, operation, or management.”

11. The Commission shall forbear from regulation of Electric Vehicle Charging Station Owners and Operators by adopting the following language:

“Pursuant to its authority under § 201(d)(1) of the Public Utilities Act, the Commission shall forbear from regulation of any entity, corporation or person involved in the ownership, control, operation, or management of a facility that supplies electricity to the public only for use to charge plug-in electric vehicles. This forbearance shall not affect any other Commission authority under the Public Utilities Act or any other applicable statute.”

12. Delmarva should file such proposed amendment(s) to its tariff as are necessary to comport with the decisions herein, recognizing that there may be a statutory issue that will need to be dealt with.

13. The Commission determines that Electric Vehicle Charging Station Owners and Operators are not an “electric supplier” pursuant to the Electric Restructuring Act by adopting the following language:

“The ownership, control, operation, or management of a facility that supplies electricity to the public only for use to charge plug-in electric vehicles does not make the entity, corporation or person an “electric supplier” under 26 *Del. C.* § 1001(14) solely because of that ownership, control, operation, or management.”

BY ORDER OF THE COMMISSION:

Chairman

Commissioner

Commissioner

Commissioner

Commissioner

ATTEST:

Secretary

EXHIBIT 1
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FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

November 20, 2019

Glenn C. Kenton
Hearing Examiner

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III. APPEARANCES

On behalf of the Delaware Public Service Commission (“Staff”):

JAMES GEDDES, ESQ.

CONNIE MCDOWELL

PATRICIA GANNON

On behalf of the Delaware Division of the Public Advocate (“DPA”):

REGINA IORII, ESQ.

ANDREW SLATER

ANDREA MAUCHER

On behalf of the Delaware Department of Natural Resources and Environmental Control (“DNREC”):

JAMESON TWEEDIE, ESQ.

SUSAN LOVE

On behalf of Delmarva Power & Light Company (“Delmarva”):

THOMAS MCGONIGLE, ESQ.

On behalf of Tesla, Inc. (“Tesla”):

KEVIN AUERBACHER, ESQ.

PATRICK BEAN

On behalf of ChargePoint, Inc. (“ChargePoint”):

BRIAN R. GREENE, ESQ.

DAVID SCHATZ

On behalf of Caesar Rodney Institute (“CRI”):

DAVID STEVENSON

On behalf of The Natural Resources Defense Council (“NRDC”):

DANIEL MCALLISTER, ESQ.

KATHLEEN HARRIS

On behalf of The Alliance for Transportation Electrification (the “Alliance”):

PHILLIP B. JONES

IV. EXECUTIVE SUMMARY

1. This docket was opened by the Delaware Public Service Commission (the “Commission” or “PSC”) on June 11, 2019 from a Staff Petition¹ in order to examine whether electric vehicle charging station owners and operators (“EVCSO&Os”) should be deregulated in Delaware. Glenn Kenton was appointed Hearing Examiner to conduct such proceedings as he deemed necessary and to report his Findings and Recommendation to the Commission.

2. Several parties intervened in this docket (in addition to Staff’s participation): DPA, DNREC, Delmarva, Tesla, ChargePoint, CRI, NRDC and the Alliance. By initial comments of the parties (“Initial Comments”) as well as their rebuttal comments (“Rebuttal Comments”), all parties agreed that the market for electrical vehicle (“EV” or “EVs”) charging stations (“EV Charging Stations”) was robust, competitive and growing without government regulation. Thus all parties recommended that regulation of Electric Vehicle Charging Station Owners and Operators (“EVCSO&Os”) by the Commission was not necessary.

3. At three noticed public comment sessions, several member of the public, including representatives of the Sierra Club of Delaware, the University of Delaware’s University of Delaware’s Policy Team Electric Vehicle Research and Development Group and the League of Women Voters, agreed with Staff that regulation of EVCSO&Os in Delaware was not necessary.

4. After consideration of the Initial Comments, the Rebuttal Comments of the parties, the public comments and the comments of the parties to the Preliminary Findings and Recommendations of the Hearing Examiner, I recommended (i) that the Commission determine that EVCSO&Os are not a “public utility” pursuant to §102(2) of Chapter 1, Title 26, *Delaware Code* (“the Public Utilities Act”), (ii), that in any case, the Commission should forbear from their

¹ *Exh. 1.*

regulation pursuant to 26 *Del. C.* § 201(d)(1), (iii) that Delmarva should file such tariff amendments as necessary to comport with the decisions herein and, (iv) that the Commission determine that an EVCSO&Os are not an “electric supplier” pursuant to § 1001(14) of Chapter 10, Title 26 *Delaware Code* (the “Electric Restructuring Act”).

V. PROCEDURAL HISTORY AND BACKGROUND

5. On June 18, 2019, by PSC Order No. 9418, the Commission initiated this docket by its finding “that deregulation by the Commission of electric vehicle charging stations and service providers may be in the public interest and that, consequently, the Commission believes it should consider deregulating electric vehicles charging stations and electric vehicle service providers.”

6. PSC Order No. 9418, *inter alia*, designated me as Hearing Examiner in this docket to have a full and complete record on the issues identified as provided in 26 *Del. C.* § 201(1) and to file with the Commission my proposed findings and recommendations.

7. In that connection, I was directed “to schedule and conduct, upon due notice, such public comment sessions and evidentiary hearings, as may be necessary, to have a full and complete record on the issues identified in 26 *Del. C.* § 201(d) *et. seq.*” Thereafter, I was directed to “file with the Commission his proposed findings and recommendations on the issue of the appropriateness of the Commission considering deregulating electric vehicles and charging stations.”

8. Public Notice of this docket was published in the *Independent Newspapers* on June 24, 2019.²

² *Exh. 2.*

9. To initiate the proceedings in this docket, after informal consultation with the parties, by letter to the parties dated August 16, 2019 (a copy of which was filed in *Delafile*), I requested a Pre-Hearing Conference (the “Pre-Hearing Conference”) among the parties pursuant to 26 *Del. Admin. C.* § 2.10 “to identify the issues the parties expect to pursue as described in PSC Rule 2.10.1.2 and the related schedule. The Pre-Hearing conference was scheduled for August 20, 2019.

10. **Pre-Hearing Conference** - On August 20, 2019, in the Main Conference room of the Commission, I convened a formal, transcribed Pre-Hearing Conference. In attendance (either in person or via telephone) were counsel and/or representatives of the following parties:

Staff.
DPA.
DNREC.
Delmarva.
Tesla.
ChargePoint.
CRI.
NRDC.
The Alliance.

11. Representatives of the Electric Vehicle Charging station owners and operators - Tesla and ChargePoint - outlined their respective business models. Tesla recited that its model involves Tesla continuing to own EV Charging Stations while leasing the space from the respective site hosts (“Site Hosts”) such as Wawa. ChargePoint, on the other hand, typically sells the EV Charging Stations to the Site Hosts (such as Royal Farms) who set the rates and collect the revenues. Delmarva recited that it is expected to own a limited number of EV Charging Stations pursuant to the decision of the Commission in PSC Docket No. 17-1094. And DNREC recited that it owns and operates EV Charging Stations in various state parks and related sites. All have different business models.

12. The parties had differing views as to the applicability of the Public Utilities Act and the Electric Restructuring Act to the various EVCSO&Os in Delaware. To the extent there was an overall agreement it was that (a) the Public Utilities Act and the Electric Restructuring Act (together, the “Acts”), respectively, were never drafted with the intent or understanding of how they might apply to EVCSO&Os and, (b) neither of these Acts as currently drafted is clear as to how it might apply to or affect the EVCSO&Os. The parties all opined that there could be an interpretation that the Public Utilities Act would make certain EVCSO&Os and/or related entities a “public utility” under § 102(2) of the Public Utilities Act and/or an “electric supplier” under § 1001(14) of the Electric Restructuring Act, but that was far from clear. All agreed that two principal goals of this docket would be to clarify the interpretation of the Public Utilities Act and the Electric Restructuring Act, respectively, as they apply to EVCSO&Os and related entities and to provide a path forward as to how the EVCSO&O and related entities would be treated in the future.³

13. After extensive discussion among all parties, it was suggested that the best path forward would be to agree to a schedule (“EV Charging Schedule”) for simultaneous comments and replies by all parties guided by a set of comments for review and consideration by the Hearing Examiner (“Comment Guidelines”).

14. The Comment Guidelines included the following issues to be commented upon by the parties:

“I. Are private entities and/or public agencies, that are not otherwise regulated by the Commission, but own and/or operate electric vehicle charging stations in Delaware for use by the public, "public utilities" under 26 *Del. C.* § 102(2)?

II. To the extent the Commission concludes the above-referenced entities and/or agencies are "public utilities" under 26 *Del C.* § 102(2),

³ Transcript of the Pre-Hearing Conference, 42-53.

should the Commission exercise its authority under 26 *Del. C.* § 201(d) to forebear from, in whole or in part, supervision and regulation of some or all of electric vehicle charging products and/or services offered by these parties?

III. Should the Commission deem it in the public interest to forbear with respect to the above-referenced entities and/or agencies, is the Commission otherwise required to reach specific findings on the criteria enumerated in 26 *Del. C.* § 201(d)(5) as incorporated in PSC Order No. 9418, and, if so, whether such findings are warranted with respect to the above-referenced parties?

IV. Are private entities and/or public agencies, that are not otherwise regulated by the Commission, but own and/or operate electric vehicle charging stations in Delaware for use by the public, "electric suppliers" under 26 *Del. C.* § 1001(14) and § 1012?

V. To the extent the Commission concludes the above-referenced entities and/or agencies are "electric suppliers" under 26 *Del. C.* § 1001(14) and § 1012, should the Commission consider amendments to Title 26, Administrative Code, § 3001 Rules for Certification and Regulation of Electric Suppliers, that are more specific to those providing such electric vehicle charging services to the public? If so, please provide specific suggestions and/or a corresponding draft regulation."

15. In particular, the findings on the criteria for forbearance of regulation as described in the Comment Guidelines and as contained in § 201(d)(5) of the Public Utilities Act ("the Forbearance Criteria") are:

a. Whether a competitive market exists for the particular utility product or service being requested to be wholly or partly deregulated? Conditions and factors to be considered may include, but are not limited to, the following:

1. The existing or prospective market power of the utility with respect to its products or services for which deregulation is sought; and
2. If there are significant entry or exit costs or other barriers to potential competitors; and
3. If there is a reasonable basis to expect that prices of wholly or partly deregulated products or services will reflect the incremental costs of supply;

b. Whether any safeguards are necessary to prevent a material adverse effect on utility service quality or rate levels;

c. Whether or not an option to remain under the Commission's supervision and regulation should be made available for customers whose utility products and services would be deregulated by the proposal;

d. Whether or not the public utility shall unbundle each service or function on which a service depends to its fundamental elements and shall make those elements separately available to any customer whose utility service is being deregulated by the proposal under terms and conditions, including price, that are the same or comparable to those used by the public utility in providing its own service. The public utility shall not unreasonably discriminate between affiliated and unaffiliated providers of services in offering unbundled features, functions and capabilities; and

e. Whether the Commission should forbear from regulating competing providers of such products or services?⁴

16. On August 28, 2019, a proposed EV Charging Schedule, together with its Comment Guidelines, was forward to me by the parties for my consideration. The EV Charging Schedule provided for simultaneous comments by all parties, followed by simultaneous rebuttal comments, followed by a Report of the Hearing Examiner and potential exceptions by the parties thereafter. After review, pursuant to PSC Order No. 9458⁵ I approved the EV Charging Schedule together with its Comment Guidelines.

IV. SUMMARY OF THE PARTIES' INITIAL COMMENTS

17. Initial Comments by each of the respective parties were duly filed by the scheduled deadline of September 25, 2019.

⁴ 26 Del. C. § 201(d)(5).

⁵ Exh. 3.

18. Staff Comments⁶ – After reviewing the procedural history of this docket and the language in § 102(2) of the Public Utilities Act, Staff in its initial comments stated it “supports an interpretation of the definition of public utilities that does not include EVCS.”⁷

19. According to Staff, should the Commission determine that EVCSO&Os are public utilities, “the Commission has the authority to forbear or refrain from exercising jurisdiction over the EVCS if the Commission deems it to be in the public interest.”⁸ Staff then stated that Commission must consider the Forbearance Criteria when making a decision⁹ and reviewed the Forbearance Criteria concluding the criteria were met in this case. In so doing, Staff stated “Staff doubts it was the intent of the legislature for the Commission to regulate these entities.” Further, “Deregulating the EVCS will provide the market with a sense of certainty and allow for future market development and growth.”¹⁰

20. Staff in its comments included survey data from the U.S. Department of Energy that, according to Staff, counts 51 EV Charging Station locations in Delaware to date.¹¹

21. As to whether an EVCSO&O is an “electric supplier” as defined in § 1001(14) of the Electric Restructuring Act, after reviewing the statute, Staff argued that EVCSO&Os “are not selling electricity just as concert promoters are not selling electricity when they allow attendees to charge their phones for a fee at a concert,” and “The use of electricity in providing the battery charging service is incidental.”¹²

⁶ *Exh. 4.*

⁷ *Id.* at 8.

⁸ *Id.* at 9.

⁹ *Id.* at 9.

¹⁰ *Id.* at 13.

¹¹ *Id.* at 10.

¹² *Id.* at 15.

22. In summary, Staff argued that the Commission should determine that an EVCSO&O is not a “public utility.” In the alternative, Staff urged the Commission to “forbear from regulating all charging stations owned by any entity other than a public utility.”¹³

23. In addition, Staff stated that if the Commission determines an EVCSO&O to be an “electric supplier” under § 1001(14) of the Electric Restructuring Act, the Commission should “submit a change to the definition of ‘electric supplier’ included in 26 *Del. Admin. Code* § 3001 that would exempt EVCS from the definition.”¹⁴

24. DPA Comments – In its initial comments,¹⁵ DPA agreed that it was “ambiguous” if an EVCSO&O is a “public utility” under the Public Utilities Act.¹⁶ Thus, DPA recommended that:

If the Commission concludes that electric vehicle charging stations are not public utilities, the Commission can explain why they are not, and close the docket. Alternatively, if the Commission does conclude that electric vehicle charging stations are ‘public utilities’ pursuant to Section 102(2), then the DPA believes the Commission should forbear from supervising and regulating electric vehicle charging products and services...where the Commission determines that a competitive exists for such products and services and where the Commission finds that such deregulation will be in the public interest.¹⁷

DPA argued that it was “clear ... that a competitive market exists in this area.”¹⁸ It pointed to seven private entities that had “invested heavily in electric vehicle charging stations in the United States,” and noted that as of September 24, 2019, Delaware already had 51 charging stations (an increase of more than 18% from the previous year) and 169 charging outlets (an increase of more than 38% from the previous year).¹⁹ Citing the language in Section 201(d), DPA stated that

¹³ *Id.* at 16.

¹⁴ *Id.* at 16.

¹⁵ *Exh. 5*

¹⁶ *Id.* at I.

¹⁷ *Id.* at II.

¹⁸ *Id.*

¹⁹ *Id.*

it did not believe that the Commission is required to reach specific findings on the Forbearance Criteria enumerated in any section other than 26 *Del. C.* § 201(d)(1):

(d)(1) In the exercise of supervision and regulation over public utilities other than those that provide telecommunications services, the Commission may, upon application or on its own motion, after notice and hearing, forbear from (“deregulate”) in whole or in part, its supervision and regulation over some or all public utility products or services and over some or all public utilities where the Commission determines that a competitive market exists for such products and services and where the Commission finds that such deregulation will be in the public interest...

Further:

(d)(5) In connection with any application under this subsection for forbearance from Commission supervision and regulation, the Commission shall find, among other relevant things, the following:... (emphasis added). (the Forbearance Criteria follow.)

25. According to DPA, “the Section 201(d)(5) criteria apply only if an entity other than the Commission requests the Commission to forbear from regulation.”²⁰

26. As to whether an EVCSO&O would be an “electric supplier” under § 1001(14) of the Electric Restructuring Act, DPA conceded that an EVCSO&O “may fall within the strict definition of ‘electric supplier.’” Therefore, “[s]hould the Commission make a determination that these entities are electric suppliers, it could open a docket to examine the certification and consumer protections needed to operate in Delaware. The Commission has no regulatory oversight over the prices charged, or services offered, by electric suppliers.”²¹

27. DPA further pointed out that Delmarva’s tariff as currently written states that a “The Customer shall not directly or indirectly sell, sublet, assign or otherwise dispose of the electric energy provided by the Company...except as authorized by Chapter 51, Title 25 of the

²⁰ *Id.* at III.

²¹ *Id.* at IV.

Delaware Code.” As a result, DPA suggested that the Commission open a docket on its own motion to amend the tariff to exempt electric vehicle charging stations.²²

28. DNREC Comments – In its initial comments,²³ DNREC stated that “[r]apid growth in EV deployment is a key component of Delaware’s strategy to mitigate climate change...” Further, “significant actions to reduce greenhouse gas emissions are necessary to avoid the worst impacts of climate change... Vehicle electrification represents the largest opportunity for greenhouse gas reductions in the transportation sector; rapid growth in EV deployment is a key component of Delaware’s strategy to mitigate climate change...DNREC supports an outcome of this docket that facilitates rapidly expanding EV charging infrastructure in Delaware. To achieve that growth, DNREC supports a competitive marketplace for EVCS with limited barriers to entry for market participants and removal of uncertainty surrounding participation in the market.” In order to achieve that goal, DNREC “believes that an order from the PSC that makes clear that to the extent the PSC has such regulatory authority it forbears from exercising it over EVCS...”²⁴

29. As to whether an EVCSO&O is a “public utility” under § 102(2) of the Public Utilities Act, DNREC provided a thorough analysis of the statute and the related case law in concluding that, under relevant case law, an EVCSO&O should not be found to be a “public utility.”²⁵ DNREC, citing *PWSC II* and *Eastern Shore*, discussed what the courts have called a “two prong” test for determining whether an entity is a “public utility” under the Public Utilities Act: “First,... whether the activities involve the ‘sale of a regulated commodity’ to third parties. [Second]... whether the sales are such that they affect the public interest in a significant manner.”²⁶

²² *Id.* at IV.

²³ *Exh.* 6.

²⁴ *Id.* at A.

²⁵ Citing generally *Eastern Shore Natural Gas Co. v. Delaware Public Service Commission*, 637 A.2d 10 (Del. 1994) (“*Eastern Shore*”), *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378 (Del. 1999) (“*PWSC I*”) and *Public Water Supply Co. v. DiPasquale*, 802 A.2d 929 (Del. 2002). (“*PWSC II*”).

²⁶ *Exh.* 6 at B1 citing *PWSC II*.

30. According to DNREC, “[t]he Delaware Supreme Court has stated that ‘[t]he pivotal issue in the determination of a company’s status as a public utility is whether the company’s activities have a significant impact on the public interest the Commission was designed to protect. This requires an examination of the potential effects of the sale... by unregulated companies upon the public interest—regardless of the number or type of customers serviced.’”²⁷

31. DNREC conceded that an EVCSO&O likely falls within the first prong of the test as it clearly sells a regulated commodity to third parties. However, DNREC argued that under the second prong of the court tests as stated in *PWSC II* – “whether the sale of electricity through EVCS ‘affect[s] the public interest the regulating agencies are responsible for protecting’”²⁸ or “whether the sale of electricity through EVCS ‘affects[s] the public interest in a significant manner’”²⁹ – “seem[s] to apply far less appropriately to EVCS.”³⁰

32. According to DNREC, “[t]he courts have indicated this turns on ‘whether the potentially regulated company’s activities had a significant impact on the public interest that the Commission was designed to protect, preserving and promoting indispensable services while preventing inferior service with excessive and discriminatory rates.’”³¹

33. According to DNREC, EVCSO&Os do not provide an “indispensable service” or have “service territories.” Customers have multiple alternatives and options to charge EVs and thus the provision of EV Charging Stations are not a monopoly.³²

²⁷ *Id.* at B1, citing *Eastern Shore*.

²⁸ *Id.* at B1.

²⁹ *Id.* at B1, citing *Reserves Development Corp.*, 2003 WL 13977 at *3 (“*Reserves Development*”).

³⁰ *Id.* at B1.

³¹ *Id.* at B1, citing *PWSC I*.

³² *Id.* at B1, citing *Eastern Shore*.

34. As a result, DNREC “believes these significant distinctions between EVCS and those industries that have historically been regulated as public utilities make a finding that EVCS are not public utilities the more appropriate interpretation of the statute and the case law.”³³

35. Like other parties, DNREC argued that should the Commission determine that EVCSO&Os are a “public utility” as defined in § 102(2) of the Public Utilities Act, the Commission should forbear from their regulation pursuant to § 201(d) of the Public Utilities Act and that the Commission need not consider the Forbearance Criteria as this docket is on the Commission’s “own motion” which does not require such a determination.³⁴

36. Also, DNREC argued that EVCSO&Os are not an “electric supplier” under § 1001(14) of the Electric Restructuring Act as they do not “utilize the transmission and/or distribution facilities of another entity” as an EVCSO&O performs its charging service “behind the meter” using its own short transmission cable to charge the EVs. Should the Commission determine that an EVCSO&O is an “electric supplier,” DNREC states that it “would be happy to work with the other parties in developing proposed regulations...”³⁵

37. Delmarva Comments – In its initial comments,³⁶ Delmarva argued that EVCSO&Os should not be determined to be a “public utility” under § 102(2) of the Public Utilities Act as they do not fall within the two prong tests that Delaware Courts have provided in ascertaining whether an entity is a “public utility” under the Public Utilities Act.³⁷

38. According to Delmarva, even if some of the models used in Delaware by the EVCSO&O meet the first prong of the test as to whether the activities “involve the sale of a

³³ *Id.* at B1.

³⁴ *Id.* at II, III.

³⁵ *Id.* at V.

³⁶ *Exh. 7.*

³⁷ *Id.* at 2, citing generally *Eastern Shore and PWSC II.*

regulated commodity to third parties” (a fact which Delmarva does not concede), nevertheless it is not likely that these entities meet the second prong of the test that the sales “affect the public interest the Commission was designed to protect in a ‘significant manner’ as that test has been interpreted in the case law.”³⁸

39. In particular, Delmarva noted that the test for a “public utility” in Delaware case law consists of whether its regulation was important to “preserving and promoting indispensable services while preventing inferior service with excessive and discriminatory rates,”³⁹ particularly “where the nature of the facilities used in providing the service and the disparity in the relative bargaining power of a utility ratepayer are such as to prevent the ratepayer from demanding a high level of service price without the assistance of governmental intervention on his behalf.”⁴⁰ According to Delmarva, in the case of EVCSO&Os there is no “indispensable service” and no “disparity in bargaining power” as the owners have multiple options to charge their EVs. Therefore, these tests as laid out by the courts in determining a “public utility” do not apply to an EVCSO&O.⁴¹

40. Delmarva stated that because it does not believe an EVCSO&O is a “public utility,” there is no reason to forbear from regulation.⁴²

41. However, according to Delmarva, should the Commission determine an EVCSO&O to be a “public utility” under § 102(2) of the Public Utilities Act, the Commission should forbear from its regulation.⁴³ Like DPA, Delmarva argued that the Forbearance Criteria do not apply to dockets undertaken by the Commission’s “own motion” as is the case in the current

³⁸ *Id.* at 3, citing *Eastern Shore*.

³⁹ *Id.* at 3, citing *PWSC I*.

⁴⁰ *Id.* at 3, citing *Eastern Shore*.

⁴¹ *Id.* at 4.

⁴² *Id.* at 5.

⁴³ *Id.* at 5.

docket, even though the Forbearance Criteria are contained in the Commission’s Order No. 9418 creating this docket.⁴⁴

42. As to whether an EVCSO&O could be found to be an “electric supplier” under § 1001(14) of the Electric Restructuring Act, according to Delmarva “while it likely was not intended when originally enacted, and certainly is not clear...,” an EVCSO&O “may fall within the definition of ‘electric supplier’ in § 1001(14)” of the Electric Restructuring Act.”⁴⁵ Under such interpretation, Delmarva recommends the Commission “consider amendments to its regulations that are specific to entities and/or agencies providing electric vehicle charging service to the public.”⁴⁶

43. Tesla Comments – In its initial comments,⁴⁷ Tesla stated that its mission is “to accelerate the transition to sustainable energy through the development of all-electric vehicles....”⁴⁸ It stated that:

The availability of charging is essential for EV sales and for EV drivers to confidently travel. Regulatory certainty that charging operators are not public utilities or energy supplies can help drive continued investment in charging services throughout Delaware. A determination to the contrary, that a charging provider would be determined to be public utilities or energy suppliers would have a profound negative impact on electric vehicle charging operators, property owners and businesses that host charging stations, and ultimately EV drivers that depend on the availability of charging services... and not in the public interest.⁴⁹

44. Tesla argued that EVCSO&Os are not a “public utility” under § 102(2) of the Public Utilities Act as they do not have “exclusive territories” and because the charging equipment is

⁴⁴ *Id.* at 6-7.

⁴⁵ *Id.* at 9.

⁴⁶ *Id.* at 9.

⁴⁷ *Exh.* 8.

⁴⁸ *Id.* at 1.

⁴⁹ *Id.* at 1.

“downstream from the physical connection point with the public utility” and thus are not using the “distribution facilities” of a public utility as defined in the Public Utilities Act.⁵⁰

45. Tesla also commented that the EVCSO&O operates in a “competitive environment” and that “no state or jurisdiction in North America has regulated electric vehicle charging as a public utility.”⁵¹

46. Tesla commented that should the Commission determine EVCSO&Os to be a “public utility,” the Commission should forbear from their regulation as provided in § 201(d)(1) of the Public Utilities Act.⁵² In that connection, Tesla argued that the Commission need not determine the Forbearance Criteria in such forbearance as the Commission in this docket is proceeding on its “own motion” which does not require a determination of the Forbearance Criteria under such proceedings.⁵³

47. ChargePoint Comments - In its initial comments,⁵⁴ ChargePoint stated that EVCSO&O are not a “public utility” as defined in the Public Utilities Act as they do not distribute electricity as do public utilities but deliver services by “specialized cords and connectors... much closer to that of a cell phone battery-charging kiosk at an airport...” Further, according to ChargePoint, EVCSO&Os operate in a competitive market unlike true public utilities. ChargePoint stated that it alone has over 100,000 EV charging stations throughout the U.S. with more than 90 in Delaware alone.⁵⁵

48. Further, ChargePoint argued that an EVCSO&O is not an “electric supplier” under § 1001(14) of the Electric Restructuring Act as the “retail sale of electricity takes place at that

⁵⁰ *Id.* at 6-7.

⁵¹ *Id.* at 8.

⁵² *Id.* at 9.

⁵³ *Id.* at 9.

⁵⁴ *Exh.* 9.

⁵⁵ *Id.* at 3-4.

customer's meter.” It likened EVCSO&Os to the provision of coin operated laundry facilities by a hotel. According to ChargePoint, EV drivers purchase electricity from the various site hosts, not as customers of Delmarva.⁵⁶

49. ChargePoint recommended that the Commission find that EVCSO&Os are not operating as a “public utility” nor as an “electric supplier” under the Electric Restructuring Act and pointed out that several other states have made similar determinations.⁵⁷

50. CRI Comments: In its initial comments,⁵⁸ CRI pointed out “that in fact a robust competitive market already exists and is expanding rapidly.”⁵⁹ It states:

... [M]assive duplication is desirable, and in fact a robust competitive market already exists, and is expanding rapidly. The U.S. Department of Energy reports 52 charging stations in Delaware with 171 outlets¹ including Wawa locations in Claymont, Newark, New Castle, Dover, and Lewes, plus other locations around the state. ChargePoint reported 36 charging stations in Delaware in public comments in PSC Docket 17-1094² including Royal Farm locations in Smyrna, Dover, Milord, Georgetown, and Bridgeville. In the same report ChargePoint estimated there were 1173 electric vehicles registered in Delaware as of the third quarter of 2017, and EV Adoption estimated another 627 were added in 2018 for a total of about 1800 vehicles.⁶⁰

51. CRI also stated “[t]he Commission should be wary of arguments the public interest is met by reductions in air pollution or carbon dioxide emissions” via the use of EVs. CRI provided several statistics that, according to CRI, suggest that EVs save minimal energy emissions when the emissions of additional electric generation capacity and its concurrent pollution, transmission losses and the extra costs of constructing EVs are considered.⁶¹

⁵⁶ *Id.* at 5.

⁵⁷ *Id.* at 6.

⁵⁸ *Exh. 10.*

⁵⁹ *Id.* at 1.

⁶⁰ *Id.*

⁶¹ *Id.* at 2.

52. In summary, CRI argued (i) that it is unclear if the Commission has the authority to declare an EVCSO&O to be either a “public utility” or an “electric supplier” under the Public Utilities Act or the Electric Restructuring Act, respectively, (ii), that in any case the Commission should forbear from their regulation, and (iii) that “Delmarva Power should not be granted the ability to offer charging as a regulated utility.”⁶²

53. NRDC Comments – In its initial comments,⁶³ NRDC stated that EVs do reduce greenhouse gases in Delaware and that “[d]ue to the potential environmental and public health benefits, Delaware should do all that it can to facilitate the growth of the electric vehicle market in the state and remove barriers for EV deployment.” To accomplish this goal, according to NRDC, “[r]esolving this jurisdictional question will remove an artificial barrier to the deployment of EV charging infrastructure in the state and allow the Delaware PSC to move on to more proactive policies that can support the expansion of the EV market necessary to meet Delaware’s climate and air quality goals.”⁶⁴

54. NRDC argued that EVCSO&Os should not be regulated as public utilities as that would require “an unreasonably broad interpretation of the definition of ‘public utility’ under the statute...” as the definition of “public utility” is “predicated on the provision of such services by a monopoly provider with a statutory obligation to provide adequate utility services at just and reasonable rates.” Charging station owners and operators are not monopoly providers and do not have state-sanctioned exclusive service territories and thus should not be determined to be a “public utility” under the Public Utilities Act according to NRDC.⁶⁵

⁶² *Id.* at 4.

⁶³ *Exh.* 11.

⁶⁴ *Id.* at I.

⁶⁵ *Id.* at III 1.

55. According to NRDC, Delaware today has 161 EV Charging Stations at 51 sites. “Regulating these owners and operators as public utilities would impose an unnecessary regulatory burden that would inhibit the state’s still nascent EV market.”⁶⁶

56. Should the Commission determine an EVCSO&O to be a “public utility,” NRDC argued that “the Commission should avoid a broad declaration that EV charging companies are not public utilities or electric suppliers against a broad forbearance process that might frustrate future Commission’s future goals; rather NRDC argues that any such forbearance should be limited to language such as was adopted in California stating that EVCSO&O are not public utilities “solely because the stations charge EVs”⁶⁷ and recommends adopting the following language:

The ownership, control, operation, or management of a facility that supplies electricity to the public only for use to charge plug-in electric vehicles does not make the corporation or person a public utility under 26 Del. C. § 102 solely because of that ownership, control, operation, or management.⁶⁸

57. NRDC further stated that in consideration of the forbearance from regulation of EVCSO&Os, the Commission, acting on its “own motion,” need not consider the Forbearance Criteria.⁶⁹

58. As to whether an EVCSO&O is an “electric supplier” under § 1001(14) of the Electric Restructuring Act, NRDC argued that such was never the intent of the original legislation. Further, according to NRDC, “[a] charging provider that is only distributing electricity onsite from

⁶⁶ *Id.* at III 1.

⁶⁷ *Id.* at III 2.

⁶⁸ *Id.* at ____.

⁶⁹ *Id.* at III 3.

a charging station to an electric vehicle is *not* utilizing a utility’s transmission or distribution facilities for that provision of electricity”⁷⁰ but rather its own proprietary connection lines.

59. Should the Commission determine an EVCSO&O to be an “electric supplier” under the Electric Restructuring Act, NRDC did not recommend a broad exemption in the Administrative Code, but rather stated that an EVCSO&O would only be deemed to be an “electric supplier” should it attempt to purchase electricity at wholesale.⁷¹

60. Finally, NRDC urged the Commission “to take proactive steps to grow the EV market in Delaware.”⁷²

61. Alliance Comments – In its initial comments,⁷³ Alliance “strongly encouraged the Commission to conclude that private entities and public entities who own and/or operate electric vehicle charging stations are not public utilities at all and do not appear to be electricity suppliers in the customary sense.”⁷⁴

62. Alliance stated that an EVCSO&O should not be found to be a “public utility” as “the evidence shows that the sale of the regulated commodity more clearly takes place between the utility and the EV charging service provider, not between the charging service provider and the driver and does not affect the public interest in a significant manner.”⁷⁵

63. Alliance argued that because it does not believe an EVCSO&O to be a “public utility,” there is no basis for the Commission to forbear from regulation.⁷⁶

⁷⁰ *Id.* at III 4.

⁷¹ *Id.* at III 5.

⁷² *Id.* at IV.

⁷³ *Exh.* 12.

⁷⁴ *Id.* at 1.

⁷⁵ *Id.* at 2-3.

⁷⁶ *Id.* at 3.

64. Alliance further argued that an EVCSO&O “appear to be, though are not necessarily, electric suppliers under §1001(14).”⁷⁷ As a result, Alliance says the Commission has a “large ‘regulatory toolbox’ that can accommodate multiple approaches and options which would serve the public interest.”⁷⁸

V. PUBLIC COMMENTS

65. One duly-noticed and transcribed public comment session was held in each county on October 1, 15 and 17, 2019, respectively.

66. At the initial public comment session held in the Commission’s Main Conference Room, Silver Lake Boulevard, Dover, DE 19901, at 6:00 p.m. October 1, 2019, no member of the public appeared to offer comments.

67. At the second public comment session held in the Gilliam Room, Reads Way, New Castle, Delaware, 6:30 p.m. October 15, 2019, there were three (3) members of the public who made comments:

- (i) On behalf of the League of Women Voters, Peggy Schultz commented that “The League concurs with the Staff of the Public Service Commission that Electric Vehicle Charging Stations should be exempt from regulation by the PSC.” Ms. Schultz also stated “[t]he League recognizes research, and it is footnoted, which shows that transportation-generated carbon dioxide emissions cannot be effectively reduced by Electrical Vehicle Technology alone. Fundamental changes in land use policy will be needed in order to seriously reduce vehicle miles traveled, a move that will be necessary if we are to effectually stem carbon dioxide emissions.”

⁷⁷ *Id.* at 4.

⁷⁸ *Id.* at 5.

- (ii) On behalf of the University of Delaware's Policy Team Electric Vehicle Research and Development Group, Ms. Sara Parkison commented "We fully support the Staff's petition to address the inappropriate definition of EV Charging Stations as public utilities, and, thereby seek relief regarding their regulation as such entities." She further commented "[t]he market for Charging Stations is vast and competitive, ensuring that monopolies will not manifest due to a lack of oversight." And finally, she commented "by recognizing the fact that Electric Vehicle Charging Stations are not utilities and fall outside of the jurisdiction of the Commission, the Commission would actually be providing regulatory certainty that will help to promote market entry from a varied group of competitive companies."
- (iii) On behalf of the Sierra Club of Delaware, Ms. Coralie Pryde, Chair of its Conservation Committee, commented "[t]he Sierra Club of Delaware strongly believes that Charging Stations for Electric Vehicles should not be treated as either public utilities or electric suppliers. There does not appear to be a clear rationale for their regulation by the PSC under existing laws." Further, she commented "Charging Stations powered by solar energy will decrease Delaware's carbon footprint from transportation which is now our largest single contributor to greenhouse gases and also adds significantly to poor air quality in urban areas. Therefore, the Sierra Club supports the position advocated for by the PSC Staff; that is, Charging Stations for EV should not be treated as public utilities or electric suppliers."

68. At the third public comment session held at the Indian River Senior Center, Millsboro at 6:30 p.m. on Thursday, October 17, 2019 there were two (2) members of the public who made comments;

- (i) Mr. Dave Hardin commented that the customer does not need to be protected from service providers. Competition is alive and well.
- (ii) Mr. Charles Garlow commented that as an EV owner, he “recommended to the Public Service Commission that if they want to have any oversight over electric vehicle service equipment, they might consider having something similar to what gas stations do, publicize [the prices] in an easily visible manner.”

69. Prior to the deadline for written public comments,⁷⁹ the Commission received only one (1) written public comment – from the Sierra Club, dated August 30, 2019. The Sierra Club stated it believed that providing a charging service did not make a Site Host subject to regulation by the Commission and cited similar decisions in other jurisdictions. The Sierra Club also stated that the Commission should clarify that utilities are not precluded from cost recovery for efforts to promote transportation electrification, including managing new EV load.

70. After the deadline for written public comments, the Commission (apparently at the behest of CRI) received several email comments largely objecting to allowing a public utility to provide EV Charging Stations as a regulated service. Several parties objected to the late allowance of these comments. However, after hearing from all parties, by Order No. 9486 I allowed such late-filed comments, recognizing the Commission’s general interest in hearing public comments and my charge to develop a “full and complete” record.

⁷⁹ August 30, 2019.

VI. SUMMARY OF THE PARTIES' REBUTTAL COMMENTS

71. Staff Rebuttal – In its brief rebuttal comments,⁸⁰ Staff generally supported the position of the other parties that an EVCSO&O is neither a “public utility” nor an “electric supplier” as defined in the Public Utilities Act and the Electric Restructuring Act, respectively.⁸¹

72. Staff further stated that the issue of how Delmarva would be treated as an EVCSO&O was dealt with in PSC Docket No. 17-1094 and PSC Order No. 9357 and that any further issues with respect thereto should be left to a litigated rate case and not further involved in this docket.⁸²

73. DPA Rebuttal - In its rebuttal comments,⁸³ DPA agreed with the other parties that and an EVCSO&O was not a “public utility” as defined in the Public Utilities Act; however because of the “ambiguity” in the statute, DPA recommended “the Commission issue an order forbearing from regulation of EVCS. Unlike a finding that EVSEs are not ‘public utilities,’ a determination to forbear from regulation will provide certainty to all market participants and removes possible statutory ambiguity.”⁸⁴

74. With respect to whether an EVCSO&O would be an “electric supplier” under the Electric Restructuring Act, DPA acknowledged this is a “closer question” than the determination that an EVCSO&O is not a “public utility” under the Public Utilities Act. DPA generally supports an interpretation of the Electric Restructuring Act that an EVCSO&O is not an “electric supplier” because a review of that Act demonstrates that it was “intended to deregulate the electric supply function of previously vertically-integrated utilities.”⁸⁵ Moreover, the fact that these services are

⁸⁰ *Exh. 13.*

⁸¹ *Id.* at 1.

⁸² *Id.* at 1.

⁸³ *Exh. 14.*

⁸⁴ *Id.* at I.

⁸⁵ *Id.*

typically behind the meter means that the product is already supplied and is not a new product or service.⁸⁶ DPA recommended that the Commission in its forbearance “make it clear that these services are not electric suppliers.”⁸⁷

75. Further, DPA encouraged Delmarva to “work with owners and operators to develop a fair and equitable interconnection process.”⁸⁸

76. DPA also reiterated its Initial Comments⁸⁹ that Delmarva needs to amend its tariff “to allow for the resale of electricity strictly for EVCS...” (i.e. EV Charging Stations).⁹⁰

77. Finally, DPA stated that the results and determinations in this docket will have no effect upon PSC Order No. 9357 because that Order will remain in “full force and effect” regardless of what the Commission ultimately does in this docket.⁹¹ DPA recommended that EVCSO&Os should be required to notify Delmarva about installations of charging equipment so that Delmarva can make upgrades to existing infrastructure if necessary and collect the costs of such upgrades from the responsible entity.⁹²

78. DPA expressed concern about the comments of some entities that public utilities should have a greater role in electrifying the transportation sector. DPA reiterated that private industry was already investing in the need for public charging, and therefore, “[a]n expanded role for Delmarva in providing EVCS is not warranted in this docket, particularly given that the Commission has already approved limited deployment of EVCS by Delmarva.”⁹³

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Exh. 5* at 4.

⁹⁰ *Exh. 14* at I.

⁹¹ *Id.* at II.

⁹² *Id.*

⁹³ *Id.* at III.

79. DNREC Rebuttal - In its rebuttal comments,⁹⁴ DNREC repeated its arguments that, under the provisions of the Public Utilities Act and related court decisions, an EVCSO&O should not be determined to be a “public utility.”⁹⁵

80. DNREC also recommended forbearance from regulation by the Commission in the event that an EVCSO&O should be determined to be a “public utility.”⁹⁶

81. DNREC reiterated its argument that an EVCSO&O should not be determined to be an “electric supplier” under the Electric Restructuring Act as the transaction occurs “behind the meter” and thus is not using the transmission facilities of a “public utility” to effectuate the transaction. Therefore, according to DNREC, “specific regulations” are not necessary. Should the PSC disagree, DNREC states that it “would be happy to work with other parties in developing appropriate regulations.”⁹⁷

82. Finally, DNREC believes that public utilities (such as Delmarva) should be encouraged to participate in the EV Charging Station market, but that such participation should be determined by an appropriate regulatory docket with the opportunity for the public to participate.⁹⁸

83. Delmarva Rebuttal – In its rebuttal comments,⁹⁹ Delmarva reiterated its views expressed in its Initial Comments that EVCSO&Os were not a “public utility” under § 102(2) of the Public Utilities Act as they do not meet the two-prong test of public utilities under Delaware case law. Delmarva pointed out that most of the parties agreed with this position.¹⁰⁰

⁹⁴ *Exh. 15.*

⁹⁵ *Id.* at 1-3.

⁹⁶ *Id.* at 3.

⁹⁷ *Id.* at 4.

⁹⁸ *Id.* at 4-5.

⁹⁹ *Exh. 16.*

¹⁰⁰ *Id.* at 2-3.

84. According to Delmarva, should the Commission determine that an EVCSO&O to be a “public utility,” “Delmarva Power supports limited Commission oversight of these entities.”¹⁰¹

85. Delmarva argued that, should the Commission decide to forbear from regulation of EVCSO&Os, it need not consider the Forbearance Criteria as the current docket is on the Commission’s “own motion” and not upon an “application.”¹⁰²

86. As to whether an EVCSO&O would be an “electric supplier” under the Electric Restructuring Act, Delmarva reiterated its original comments that the statute “could be interpreted” to include them. As a result, “Delmarva Power recommended the Commission consider amendments to its regulations that will more appropriately govern electric vehicle charging services than the current electric supplier regulations.” And Delmarva pointed out that “others agree.”¹⁰³

87. Finally, Delmarva stated that the decisions of this docket should not affect the settlement in PSC Docket No. 17-1094. To do otherwise, according to Delmarva “Would be contrary to the settlement agreement in that docket.”¹⁰⁴

88. Tesla Rebuttal – In its rebuttal comments,¹⁰⁵ Tesla reiterated its belief that an EVCSO&O is neither a “public utility” as defined in the Public Utilities Act nor an “electric supplier” as defined in the Electric Restructuring Act because the charging does not utilize the transmission facilities of a public utility as it occurs “behind the meter.” Unlike some of the other

¹⁰¹ *Id.* at 5.

¹⁰² *Id.* at 5-7.

¹⁰³ *Id.* at 8.

¹⁰⁴ *Id.* at 11.

¹⁰⁵ *Exh.* 17.

parties, Tesla believes that the law is clear on this point and the Commission should not accept the invitation of other for a “light touch” regulatory response.¹⁰⁶

89. Tesla also recommended the Commission “maintain oversight” of public utilities providing EV Charging Stations “to ensure ratepayers’ interests are considered and that activities of the public utility will not have an adverse impact on non-utility charging operators.”¹⁰⁷

90. ChargePoint Rebuttal - In its rebuttal comments,¹⁰⁸ ChargePoint reiterated its Initial Comments and supported the comments of other parties that an EVCSO&O is not a “public utility” as defined in the Public Utilities Act. According to ChargePoint, “Fundamentally, the core of the regulatory compact between public utilities and their regulators does not exist in this instance because independent EV charging companies are not natural monopolies seeking exclusive, state-sanctioned service territories.”¹⁰⁹

91. ChargePoint also commented that EVCSO&Os should not be determined to be and an “electric supplier” as defined in the Electric Restructuring Act as they do not use a utility’s transmission and distribution infrastructure in providing their services.¹¹⁰

92. ChargePoint stated that it believes that deregulation of private EVCSO&Os does not prevent the Commission from future regulation of a public utility providing EV Charging Station services and urges the Commission to be mindful of any negative impact on the competitive EV Charging Station market. ChargePoint also stated that the Commission can play an important role in the growth of the transportation electrification market.¹¹¹

¹⁰⁶ *Id.* at 1-3.

¹⁰⁷ *Id.* at 4.

¹⁰⁸ *Exh.* 18.

¹⁰⁹ *Id.* at 4.

¹¹⁰ *Id.* at 6.

¹¹¹ *Id.* at 7-9.

93. CRI Rebuttal – In its rebuttal comments,¹¹² CRI stated “The parties are unanimous in the view there is a competitive market for charging, and the Commission should not regulate this business. Should the Commission agree, there is no need for regulated utility participation in what is otherwise a free market for charging.”¹¹³

94. CRI restated its initial comments that it does not believe that EVs contribute positively to reducing emissions in Delaware. It further provided extensive comments opposing the rationale for Delmarva’s participation in the EV Charging market using ratepayer funds although it stated that it recognized that the Commission had resolved this issue for the moment in the settlement in PSC Docket 17-1094.¹¹⁴

95. NRDC Rebuttal – In its rebuttal comments,¹¹⁵ NRDC stated that this docket should only apply to private EVCSO&Os and not to public utilities, and that the decisions in this docket will have “no impact” on the activities of regulated public utilities providing EV Charging services or upon the settlement in PSC Docket 17-1094.¹¹⁶

96. NRDC reiterated its Initial Comments that, while supporting the various parties’ support for deregulation of independent EVCSO&Os, cautioned the Commission that in its deregulation it take care not to restrict its regulation of public utilities providing EV Charging services. It should provide “that independent EV charging companies are not public utilities or electric suppliers merely because those companies operate EV charging stations.”¹¹⁷

97. In a lengthy section in its Rebuttal Comments entitled “The Commission Should Give Little Weight to False Claims made by the Caesar Rodney Institute,” NRDC hotly disputed

¹¹² *Exh.* 19.

¹¹³ *Id.* at 1.

¹¹⁴ *Id.* at 1-9.

¹¹⁵ *Exh.* 20.

¹¹⁶ *Id.* at 1.

¹¹⁷ *Id.* at 2.

the contentions of CRI that transportation electrification does not significantly reduce electric customers' bills nor reduce greenhouse gas emissions and provides extensive data to the contrary.¹¹⁸

98. The Alliance for Transportation Electrification Rebuttal. - In its rebuttal comments,¹¹⁹ the Alliance reiterated its general support of the other parties' position for the deregulation of EVCSO&Os.¹²⁰

99. The Alliance also urged the Commission to encourage a "strong utility role in these early stages of market development by approving a variety of pilot programs..." to encourage EVs and commented that a utility has a "longer time frame in which to consider investments" than do independent, private EVCSO&Os. The Alliance believes that "the regulated public utility can and should service as a key 'facilitator' ... and as a key 'enabler' of these market transformations."¹²¹

100. The Alliance reviewed the status of the proceedings in PSC Docket 17-1094 and PSC Order No. 9357 and recommended the Commission utilize the Working Group created thereby to continue planning and development for increased EV programs in Delaware.¹²²

101. The Alliance also commented on the written public comments submitted after the original deadline. The Alliance asked the Commission to "consider their origin as having been solicited late from a single Intervenor hostile to the direction the Commission has already approved" and "outside the scope of where this is today."¹²³

¹¹⁸ *Id.* at 5-8.

¹¹⁹ *Exh.* 21.

¹²⁰ *Id.* at 1.

¹²¹ *Id.* at 2-4.

¹²² *Id.* at 5-8.

¹²³ *Id.* at 9.

VII. PRELIMINARY DISCUSSION

A. General

102. As demonstrated in the consideration of PSC Docket No. 17-1094 and in the testimony in this Docket, the issue of future of EVs, their ability to prosper and grow without subsidies and their role (if any) in reducing greenhouse gas emissions is a contentious one. In this Docket (as described above), DNREC, NRDC and the Alliance – and others - have argued forcefully that EVs will continue to grow and expand and will contribute to the reduction of greenhouse gas emissions in Delaware. As a result, they believe that continued state support for their development is a must. CRI, on the other hand (as in PSC Docket 17-1074), continues to argue just as forcefully that subsidies for EVs are an unnecessary wealth transfer to their already wealthy owners without which subsidies EVs would not grow and prosper. Further, CRI argues that EVs play little, if any, role in reducing greenhouse gas emissions, especially when considering the extra emissions from the electric generation points and the downstream transmission inefficiencies.

103. In spite of the parties' differences on the overall issue of the development of the future of EVs and their role in reducing greenhouse gasses, all parties in this docket are in general agreement that the required EV Charging Stations are already growing in number and expanding in Delaware without regulation to date and thus further regulation was not in the public interest.

104. Staff in its comments reviewed the development of EV Charging Stations across the country and in Delaware and pointed out that, to date, there are 51 EV Charging Station locations in Delaware and they continue to grow and expand without government regulation. NRDC in its Initial Comments pointed out that today Delaware has 169 EV Charging Stations at 51 locations.¹²⁴

¹²⁴ *Exh 4* at 11.

105. CRI in its Initial Comments stated:

The U.S. Department of Energy reports 52 charging stations in Delaware with 171 outlets¹ including Wawa locations in Claymont, Newark, New Castle, Dover, and Lewes, plus other locations around the state. ChargePoint reported 36 charging stations in Delaware in public comments in PSC Docket 17-1094² including Royal Farm locations in Smyrna, Dover, Milord, Georgetown, and Bridgeville. In the same report ChargePoint estimated there were 1173 electric vehicles registered in Delaware as of the third quarter of 2017, and EV Adoption estimated another 627 were added in 2018 for a total of about 1800 vehicles.¹²⁵

106. As a result of the clear evidence that EV Charging Stations are significant in number in Delaware and growing without regulation, all parties have commented that EVCSO&Os should not be regulated in Delaware.

107. Having considered the unanimous comments of the parties that EV Charging Stations have grown and will likely continue to grow and prosper best without governmental regulation, I concur. The data presented is persuasive in this regard. Thus we do not, in this docket, need to delve into the contentious issues surrounding the future of EVs and their role, if any, in reducing greenhouse gas emissions. Nor is it within the scope of this docket to consider the recommendations of NRDC and the Alliance that utilities and the Commission should take a more active role in promoting vehicle electrification. That is beyond the scope of this docket.

108. The issue in this docket then becomes “How should the deregulation of EVCSO&Os be accomplished in Delaware, especially given the thorny current provisions of the Public Utility Act and the Electric Restructuring Act?” Here the parties differ somewhat – although not materially - as to their respective analyses and approaches.

¹²⁵ *Exh. 10* at 1.

B. Is an EV Charging Station Owner and/or Operator a “public utility?”

109. The first issue to examine in this regard is whether the EVCSO&Os are a “public utility” as defined in § 102(2) of the Public Utilities Act? If they are, they would be subject to the extensive regulatory provisions of the Public Utilities Act regarding public utilities.

110. First, reviewing the statute, 26 Del. C. § 102(2) defines a “public utility” as:

“... every individual, partnership, association, corporation, joint stock company, agency or department of the State or any association of individuals engaged in the prosecution in common of a productive enterprise (commonly called a “cooperative”), their lessees, trustees or receivers appointed by any court whatsoever, that now operates or hereafter may operate for public use within this State...any ... electric (excluding electric suppliers as defined in § 1001 of this title) ... service, system, plant or equipment.”

111. I have read the thoughtful and helpful comments of the parties on this question. The statute is broad. While all parties agree that an EVCSO&O either is not, or should not be found to be, a “public utility” under the Public Utility Act, I am particularly persuaded by the comments and detailed analysis of counsel to DNREC and Delmarva relating to of the term “public utility” in the Public Utility Act. Both point to the Delaware case law surrounding an interpretation of the term “public utility.” They both cite the seminal Delaware cases of *Eastern Shore* and *PWSC I* and *PWSC II* in which the respective courts delve deeply into the meaning of “public utility” in Delaware.

112. Beginning in *Eastern Shore*, Delaware courts have held that there is a two-prong analysis required to determine if an enterprise is a “public utility” pursuant to §102(2) of the Public Utilities Act. As the Court stated in *PWSC II*:

As this Court summarized in *PWSC III*¹²⁶, the Supreme Court advocated a two-part test for the determination of whether an entity is a public utility when it considered

¹²⁶ Because of differing references, this case refers to *PWSC I* as defined herein.

this case on appeal. First, the deliberative body must look at whether the activities involve the ‘sale of a regulated commodity’ to third parties. If the activities do involve the sale of a regulated commodity, the analysis shifts to establishing whether the sales are such that they affect the public interest in a significant manner?

113. Each of the parties who addressed this particular analysis agreed it was likely that the first prong of the analysis – whether the activities of the EVCSO&Os operating EV Charging Stations to re-charge the electric batteries of an EV involves the sale of a regulated commodity - is met. The EV Charging Stations are selling electricity – a regulated commodity - to third parties.

114. The analysis then turns to the second prong of the test for determining whether an enterprise is a “public utility”: whether the activities of the entity are such that they affect the public interest in a significant manner? This analysis is more subjective. DNREC and Delmarva, in particular, addressed this issue in detail in their comments above.

115. In its Initial Comments, DNREC noted, citing *Eastern Shore*, “[t]he pivotal issue in the determination of a company’s status as a public utility is whether the company’s activities have a significant impact on the public interest the Commission was designed to protect. This requires an examination of the potential effects of the sale... by unregulated companies upon the public interest - regardless of the number or type of customers serviced.”¹²⁷

116. As further stated by DNREC, citing *PWSC I*, “[t]he courts have indicated this turns on ‘whether the potentially regulated company’s activities had a significant impact on the public interest that the Commission was designed to protect, preserving and promoting indispensable services while preventing inferior service with excessive and discriminatory rates.’”¹²⁸

117. According to DNREC, EVCSO&Os do not provide an “indispensable service” nor do they have “service territories.” Customers have multiple alternatives and options to charge EVs

¹²⁷ *Exh. 6* at B1.

¹²⁸ *Id.* at B1, citing *PWSC I*.

and thus the provision of EV Charging Station are not a monopoly. As a result, according to the comments of DNREC, an EVCSO&O should not be determined to be a “public utility” pursuant to § 102(2) of the Public Utilities Act.¹²⁹

118. In its comments, Delmarva cites similar provisions of Delaware law as has DNREC. It pointed to the language in *PWSC I* and *Eastern Shore* that the Courts have cited in determining whether an entity is a “public utility” - “preserving and promoting indispensable services while preventing inferior service with excessive and discriminatory rates”... particularly “where the nature of the facilities used in providing the service and the disparity in the relative bargaining power of a utility ratepayer are such as to prevent the ratepayer from demanding a high level of service price without the assistance of governmental intervention on his behalf.”¹³⁰

119. According to DNREC and Delmarva, these tests clearly do not apply to an EVCSO&O. I agree. The provision of EV Charging Stations is not a monopoly. Thus customers who don’t like the price of one EV Charging Station can use another, or they can (and do) charge their EVs at home. The rates are set in the free marketplace, not by a monopoly provider. EVCSO&Os do not provide an “indispensable service.” Charging of EVs can be done at home. And there is no “disparity in bargaining power” as the user has many choices. Thus the typical public interests that the regulation of a “public utility” is designed to protect against are clearly not present in the case of EVCSO&Os.

120. Another key analysis in determining whether the activities of an EVCSO&O constitute a substantial impact on the public interest is whether the provider has a service territory. As pointed out by DNREC in its Initial Comments – and by others - EV owners are not confined to a specific territory but rather are mobile and travel to the EVCSO&O. They do not need public

¹²⁹ *Id.* at BL.

¹³⁰ *Exh. 7* at 4.

regulatory oversight to prevent price gouging and quality service as they can choose from multiple providers or charge the EVs themselves at their homes.¹³¹ I agree.

121. I have considered the thoughtful comments of the parties generally and with the specific analyses provided by Delmarva, DPA, DNREC and others concluding that EVCSO&Os are not a “public utility” under § 102(2) of the Public Utilities Act. I have reviewed carefully the Delaware court cases in this regard, including *Eastern Shore*, *PWSC I, II & III* and *Reserves Development* together with their references. After such consideration and review, I conclude that EVCHO&Os do not meet the tests of being a “public utility” pursuant to § 102(2) of the Public Utilities Act. Accordingly, I recommend the Commission concur by adopting language similar to that language adopted in California, as recommended by the Natural Resources Defense Council in its Initial Comments (above):

The ownership, control, operation, or management of a facility that supplies electricity to the public only for use to charge plug-in electric vehicles does not make the entity, corporation or person a public utility under 26 Del. C. § 102 solely because of that ownership, control, operation, or management.

C. Forbearance from Regulation.

122. However, I am aware that neither my determination nor even a determination by the full Commission with respect to the interpretation of a Delaware statute is binding. The issue of the interpretation of the meaning of a “public utility” is ultimately up to the Delaware courts. And the courts do not give deference to the Commission’s decision regarding its interpretation of a statute. As the Court has stated in *PWSC I*, the review of the determination of the Commission as to the interpretation of a Delaware statute is a *de novo* review for which the courts have “plenary” power.

¹³¹ *Exh. 6* at BI.

On appeal from a decision of an administrative agency the reviewing court must determine whether the agency ruling is supported by substantial evidence and free from legal error. *State, Dept. of Labor v. Medical Placement Services, Inc.*, Del. Super., 457 A.2d 382, 383 (1982), *aff'd*, Del. Supr., 467 A.2d 454 (1983). Absent an abuse of discretion, the decision of the agency must be affirmed. *Id.* However, where, as here, the issue is one of construction of statutory law and the application of the law to undisputed facts, the court's review is plenary. *E.I. du Pont de Nemours Co., Inc. v. Shell Oil Co.*, Del. Supr., 498 A.2d 1108, 1113 (1985). 616 A.2d at 1208. (emphasis added)¹³²

123. Because a determination and/or decision by the Commission is not the last word on whether an EVCSO&O is a “public utility” under § 102(2) of the Public Utilities Act, I believe it is prudent for the Commission to exercise, at this time, its forbearance authority pursuant to § 201(d) of the Public Utilities to also forbear from their regulation. That way, the certainty that all of the parties in this docket have mentioned is so important for the growth and prospering of EV Charging Stations can be implemented promptly.

124. I have examined carefully the contentions of all parties who have commented on this issue of the findings the Commission must make in order to forbear from the regulation of EVCSO&Os under the § 201(d) of the Public Utility Act. See the language of the statute:

(d)(1) In the exercise of supervision and regulation over public utilities other than those that provide telecommunications services, the Commission may, upon application or on its own motion, after notice and hearing, forbear from (“deregulate”) in whole or in part, its supervision and regulation over some or all public utility products or services and over some or all public utilities where the Commission determines that a competitive market exists for such products and services and where the Commission finds that such deregulation will be in the public interest...

Further:

(d)(5) In connection with any application under this subsection for forbearance from Commission supervision and regulation, the Commission shall find, among other relevant things, the following:... (emphasis added). (the Forbearance Criteria follow.)

¹³² *PWSC I*, op cit.

125. So the statute makes a clear distinction between those matters initiated by the Commission's "own motion" and those of a third party via an "application." The Forbearance Criteria contained in § 201(d)(5) of the Public Utility Act seem only to apply to an "application," not to a matter upon the Commission's "own motion." Only Staff in its Initial Comments reviewed the Forbearance Criteria and comes to the conclusion that the criteria are met in this case and thus the Commission should forbear from regulation of EVCSO&Os. The other parties conclude from examining the record that the Commission has opened this docket on its "own motion" and therefore the Forbearance Criteria do not apply.

126. I am persuaded not only from the comments of the parties but from my examination of the record, including the original transcript of the Commission's adoption of Order No. 9478 creating this docket, that the Commission has opened this docket on its "own motion" and not upon the application of any party.¹³³ The Public Utilities Act in § 201(d)(1) makes this distinction. This determination becomes critical because I believe the Forbearance Criteria of the statute applies only to third party applications, not to the Commission's "own motion."

127. So I conclude that to forbear from the regulation of EVCSO&Os, the Commission on its own motion need only determine that "a competitive market exists for such products and services and where the Commission finds that such deregulation will be in the public interest."¹³⁴

128. I believe the record in this docket is replete with evidence (cited above) that a competitive market for EV Charging Stations exists in Delaware. Several parties have commented that there are in excess of 160 EV Charging Stations to date in 51 or more locations. And the record confirms these numbers are growing rapidly. I agree and find that a competitive market for EV Charging Stations exists in Delaware.

¹³³ See Transcript opening this docket.

¹³⁴ 26 *Del. C.* §201(d)(1).

129. The record in this docket and comments (also cited above) also make it clear that the support by the Commission of the nascent EV market is in the public interest. All parties commented that the best way to continue this growth of EV Charging Stations in Delaware is to avoid unnecessary government regulation. I agree.

130. For these reasons, I find that the forbearance of regulation of EV Charging Stations in Delaware would be in the public interest and recommend to the Commission that it concur.

131. However, NRDC in its Initial Comments has urged the Commission to be careful in the language of forbearance so that any such forbearance is not overly broad and limit the Commission in its future ability to deal with any issues that arise in this regard. NRDC comments upon similar discussions in similar proceeding in California. In particular, NRDC recommended that any such forbearance of regulation of EVCSO&Os be limited to language that states that such forbearance be “only to the extent that such EVCSO&Os charge EVs” thus providing to the Commission future flexibility should such entities be engaged in other potentially-regulated activities. NRDC cites language adopted in California in this regard that I have cited and recommended above in connection with the definition of a “public utility” pursuant to § 102)2) of the Public Utility Act.¹³⁵ I agree with NRDC that adding similar language to the forbearance decision would be wise.

132. Therefore, I recommend to the Commission that in connection with its forbearance of regulation over EV Charging Stations and their Owner and Operators, it adopt the following language:

“Pursuant to its authority under § 201(d(1) of the Public Utilities Act, the Commission shall forbear from regulation of any entity, corporation or person involved in the ownership, control, operation, or management of a facility that supplies electricity to the public only for use to charge plug-in

¹³⁵ *Exh. 11* at III 2.

electric vehicles. This forbearance shall not affect any other Commission authority under the Public Utilities Act or any other applicable statute.”

D. Tariff Changes.

133. As DPA has pointed out in its Initial Comments and its Rebuttal Comments, Delmarva’s tariff as currently written states that a “Customer shall not directly or indirectly sell, sublet, assign or otherwise dispose of the electric energy provided by the Company...except as authorized by Chapter 51, Title 25 of the Delaware Code.” As a result, DPA “suggests that the Commission open a docket on its own motion to amend the tariff to exempt electric vehicle charging stations.”¹³⁶

134. I concur with DPA’s comments that Delmarva’s tariff needs to be amended in this connection. However, I would place the burden upon Delmarva to make its normal application to the Commission to amend its tariff in this regard.

E. Is an EV Charging Station Owner and/or Operator an “electric supplier?”

135. While the parties generally agree that an EVCSO&O is not a “public utility” under the Public Utilities Act, there is not universal agreement as to whether it is – or might be - an “electric supplier” under the strict language of the Electric Restructuring Act. There is, however, unanimous agreement among the parties that they should not be an “electric supplier” subject to the extensive rules and regulations of Chapter 10, Title 26, *Del. Code*.

136. Consider the language of § 1001(14) of the Act:

(14) “Electric supplier” means a person or entity certified by the Commission that sells electricity to retail electric customers utilizing the transmission and/or distribution facilities of a nonaffiliated electric utility, including:

a. Municipal corporations which choose to provide electricity outside their municipal limits (except to the extent provided prior to February 1, 1999);

¹³⁶ *Exh. 4* at IV.

b. Electric cooperatives which, having exempted themselves from the Commission's jurisdiction pursuant to §§ 202(g) and 223 of this title, choose to provide electricity outside their assigned service territories; and

c. Any broker, marketer or other entity (including public utilities and their affiliates).

137. Comments of the parties on this issue range from EVCSO&Os “should not be ‘electric suppliers’” (Staff), to “the statutory language places them squarely within the definition of ‘electric supplier’” (DPA), they “may fall within the definition of ‘electric supplier’” (Delmarva), they “are not an ‘electric supplier’ under § 1001(14) of the Public Utilities Act as the “retail sale of electricity takes place at that customer’s meter” (ChargePoint). According to ChargePoint, EV drivers purchase electricity from the various site hosts, not as customers of Delmarva. DNREC and Staff concur with ChargePoint in its interpretation that because the charging of EVs takes place “behind the meter,” an EVCSO&O would not be an “electric supplier.”

138. Like several of the parties, my preliminary view, subject to the further comments of the parties is that I was not convinced that the “sale is behind the meter” argument wins the day. It is an argument, for sure; but in my mind it may not be a sufficiently compelling one given the language of the statute. But I do agree with the parties that, regardless of the reading of the statute, it was never the intent of this statute to include EVCSO&Os in its sweep.

139. As a result, my initial inclination was to recommend that the Commission should amend 26 *Del. Admin. Code* § 3001 (“Electric Restructuring Regulations”) to clarify that an EVCSO&O is not an “electric supplier” under § 1001(14) of the Electric Restructuring Act.¹³⁷ Others have suggested similar options should it not be clear that an EVCSO&O is not an “electric

¹³⁷ *Exh. 4* at 16.

supplier” under the Electric Restructuring Act, including: the Commission should “consider amendments to its regulations that are specific to entities and/or agencies providing electric vehicle charging service to the public” (Delmarva), DNREC “would be happy to work with the other parties in developing proposed regulations...” (DNREC) and the Commission has a “large regulatory toolbox that can accommodate multiple approaches and options which would serve the public interest.” (Alliance)

140. As it recommended in its Initial Comments, NRDC, borrowing from its experience with respect to similar issues in California, recommended that any such amendment to the Electric Restructuring Regulations to define an “electric supplier” should be sufficiently narrow to avoid unintended consequences and to preserve for the Commission its future flexibility in an ever-changing industry. Again, I agree with NRDC.

141. The original regulations with respect to electric restructuring were subsumed in Regulation Docket No. 49 of the Commission. Recognizing that there is a strict process for amending state regulations in Delaware, it was my preliminary inclination, subject to further comments of the parties, to recommend the Commission order a re-opening of Regulation Docket No. 49 and direct Staff, after consultation with the parties in this docket, to promptly propose to the Commission such amendments to the Electric Restructuring Regulations as would be required to clarify that an EVSO&O is not an “electric supplier” pursuant to § 1001(14) of the Electric Restructuring Act solely because it charges Electric Vehicles. Nevertheless, I understand that a re-opening of Regulation Docket No. 49 has many ancillary issues, including the potential involvement of many parties to that docket not parties to this docket. Further, Regulation Docket No. 49 was a difficult chore that took over five (5) years to complete.

**VIII. PRELIMINARY FINDINGS AND RECOMMENDATIONS –
PARTIES’ COMMENTS**

142. Prior to the release of my Findings and Recommendations, after discussion with the parties, it was agreed that the most expeditious process to resolve the issues in this docket would be for me to release my Preliminary Findings and Recommendations and to provide to the parties the opportunity to comment thereon prior to its final release. Accordingly, on November 5, 2019 I circulated to the parties my Preliminary Findings and Recommendations for their comments.¹³⁸ Comments were received from all parties by November 13, 2019.

143. Three of the parties - DNREC, Tesla and Charge Point had no substantive comments and generally supported the Preliminary Findings and Recommendations of the Hearing Examiner.¹³⁹

144. DPA generally supported the Preliminary Findings and Recommendations and provided numerous (and much appreciated) edits to the draft virtually all of which I accepted.¹⁴⁰ DPA did comment upon the recommendation of NRDC that the “Commission encourage Delmarva to propose programs and investments to accelerate widespread transportation electrification” stating that such a recommendation was outside the scope of the current docket and suggested the Findings and Recommendations make this clear.¹⁴¹

145. NRDC commented only to reiterate its initial comment that the “Commission encourage Delmarva to propose programs and investments to accelerate widespread transportation electrification.”¹⁴² DPA objected strongly to NRDC’s recommendation.¹⁴³

¹³⁸ *Exh. 22.*

¹³⁹ *Exhs. 25, 27 and 28.*

¹⁴⁰ *Exh. 24.*

¹⁴¹ *Exh. 31.*

¹⁴² *Exh. 30.*

¹⁴³ *Exh. 31.*

146. CRI commented only to language in the Preliminary Findings and Recommendations that stated that CRI was seeking to overturn the Commission’s decision in Docket 17-1094, stating that it “expected the ruling to stand” and said that “The question remains open as to whether Delmarva should spend additional ratepayers funds on charging infrastructure as a regulated utility when the rest of the providers are in a competitive market.”¹⁴⁴

147. Delmarva generally supported the Preliminary Findings and Recommendations and had only three recommendations: (i) the forbearance language should memorialize that the proposed Commission forbearance finding as an “alternative finding, to be triggered if there is a subsequent judicial determination that Electric Vehicle Charging Station Owners and Operators are public utilities under the Public Utilities Act,” (ii) the recommendation that Delmarva should file an amendment to its tariff to comport with the contemplated Commission Order in this docket should recognize that there may be a statutory issue with such a tariff amendment and “[s]uggests the Findings and Recommendations recognize this as an issue that may need to be resolved in this context” and, (iii) the recommendation that the Commission re-open Regulation Docket 49 for the purpose of further defining “electric supplier” should make it clear that such re-opening “is sufficiently focused so it does not invite a broad review of the extensive electric supplier regulations.”¹⁴⁵

148. Finally, Staff also generally supported the Preliminary Findings and Recommendations but had a substantive objection to the recommendation that Regulation Docket No. 49 be re-opened to clarify that an EVCSO&O was not an “electric supplier” as defined in 26 *Del. C. S* 1001(14).¹⁴⁶ Staff argued that such a process would be “arduous and

¹⁴⁴ *Exh.* 29.

¹⁴⁵ *Exh.* 26.

¹⁴⁶ *Exh.* 23.

time-consuming,” noting that the original docket took more than five years to complete and not necessary. Staff stated that it believed the intent of the statute was never to include EVCSO&Os as “electric suppliers.” Further, Staff argued that the language in § 1001(14) of the Electric Restructuring Act defining “electric supplier” to include entities “*utilizing the transmission and/or distribution facilities of a nonaffiliated electric utility*” did not encompass EVCSO&Os as these entities use their own proprietary lines to connect to EVs. As a result, Staff believes that the Commission should simply make the clarification that EVCSO&Os are not an “electric supplier” within the meaning of 26 *Del. C.* § 1001(14).¹⁴⁷

149. Following Staff’s comments, Delmarva’s counsel pointed to a provision in the Delaware Administrative Procedures Act (“APA”)¹⁴⁸ that seems to allow regulations to be informally amended (without going through the full process of a regulation docket if amendments are “codifications of existing agency or judicial principles of decision derived from previous decisions and rulings.”¹⁴⁹ Delmarva suggested that were the Commission to adopt the recommendation of Staff that the Commission adopt the clarification/policy that an EVCSO&O is not an “electric supplier” pursuant to the Electric Restructuring Act, the Commission could later informally amend the Electric Restructuring Regulations in this regard. DNREC stated that such a process would not be appropriate under the provision of the APA.

IX. DISCUSSION

150. I have considered the thoughtful and helpful comments of the parties with respect to my Preliminary Findings and Recommendations. As noted above, DNREC, Tesla and ChargePoint all supported my Preliminary Findings and Recommendations without comment.

¹⁴⁷ *Id.*

¹⁴⁸ 29 *Del. C.* Ch. 101.

¹⁴⁹ 29 *Del. C.* § 10113(b).

151. NRDC and DPA generally supported my Preliminary Findings and Recommendations, but differed in regard to NRDC's continued recommendation that the "Commission encourage Delmarva to propose programs and investments to accelerate widespread transportation electrification." As noted above, DPA strongly opposed NRDC's recommendation, noting that such a recommendation was beyond the scope of this docket and should be considered in a separate docket. DPA pointed out that this was a contentious issue not properly before the Commission at this time. I agree with DPA. This issue was hotly contested in PSC Docket No. 17-1094 with respect to Delmarva's application to construct EV Charging Stations as a regulated asset and led to a contentious settlement. Nowhere in the charge in this docket contained in PSC Order No 9418 is the issue of the future role of utilities in transportation electrification mentioned. So I decline to include this recommendation of NRDC in my Findings and Recommendations. I recommend the Commission should leave this thorny issue to another day.

152. As to Delmarva's comment that the forbearance recommendation be stated in the alternative should the decision of the Commission's declaration that an EVCSO&O was not determined to be a "public utility" under the Public Utilities Act be overturned by the Delaware Courts, I believe that to incorporate such a future contingency will unnecessarily muddy the waters in this matter when all parties have expressed a desire for prompt decisions. Any future court decision could take many routes, all of which are inherently unknowable at the current time. All of the interested parties are present in this docket. I believe the better course is for the Commission to decide to forbear from further regulation of EVCSO&Os at this time.

153. As to Delmarva's comment that there may be a statutory issue with respect to a recommendation that it file a tariff amendment to comport with the decisions in this docket, no

other party has raised or discussed this issue. However, I take Delmarva at its word that there may be an issue, so I will tailor my recommendation in this regard.

154. As to Delmarva's final comment that any re-opening of Regulation Docket No 49 be strictly focused, I refer to my comments below in this regard.

155. As to CRI's comment that its rebuttal comment concerning its continued opposition to Delmarva operating EV Charging Station should not be construed to mean it was seeking to overturn the settlement in PSC Docket 17-1074, I concur and have changed my language in this regard.¹⁵⁰

156. Finally, as to Staff's opposition to re-opening PSC Regulation Docket No. 49, I have thought long and hard about my Preliminary Findings and Recommendations in this regard. I concur with Staff's desire to avoid bringing a whole host of other parties into this matter as would be the case. Further, I am mindful of the "arduous and time consuming" history of that docket that required more than five (5) years to complete. I agree with all parties that including EVCSO&Os in the definition of "electric supplier" was never intended. And I agree that there is an argument that, in connecting to EVs, and EVCSO&O is using its own proprietary cables and not the transmission lines of a utility (although as I, and many of the parties have said, the language in the statute is not clear in this regard). So I will withdraw that recommendation contained in my Preliminary Findings and Recommendations. I will recommend language for the Commission's own adoption in this regard.

157. As to Delmarva's suggestion that, once the Commission make a decision that an EVCSO&O is not an "electric supplier" pursuant to the Electric Restructuring Act, the Commission might consider availing itself of the provisions of the APA to informally amend the

¹⁵⁰ See paragraph 99 above.

regulations in this regard, counsel to DNREC has stated that this route is of dubious wisdom. Further, the other parties have not had an opportunity to comment on this suggestion. I recommend the Commission leave this issue for another day.

X. FINDINGS AND RECOMMENDATIONS

158. For the reasons set forth above, I find and recommend to the Commission the following:

159 The Commission should determine that Electric Vehicle Charging Station Owners and Operators are not a “public utility” pursuant to the Public Utilities Act by adopting the following language:

“The ownership, control, operation, or management of a facility that supplies electricity to the public only for use to charge plug-in electric vehicles does not make the entity, corporation or person a public utility under 26 *Del. C.* § 102 solely because of that ownership, control, operation, or management.”

160. The Commission should forbear from regulation of Electric Vehicle Charging Station Owners and Operators by adopting the following language:

“Pursuant to its authority under § 201(d)(1) of the Public Utilities Act, the Commission shall forbear from regulation of any entity, corporation or person involved in the ownership, control, operation, or management of a facility that supplies electricity to the public only for use to charge plug-in electric vehicles. This forbearance shall not affect any other Commission authority under the Public Utilities Act or any other applicable statute.”

161. Delmarva should file such proposed amendment(s) to its tariff as are necessary to comport with the decisions herein, recognizing that there may be a statutory issue that will need to be dealt with.

162. The Commission should determine that Electric Vehicle Charging Station Owners and Operators are not an “electric supplier” pursuant to the Electric Restructuring Act by adopting the following language:

“The ownership, control, operation, or management of a facility that supplies electricity to the public only for use to charge plug-in electric vehicles does not make the entity, corporation or person an “electric supplier” under 26 *Del. C.* § 1001(14) solely because of that ownership, control, operation, or management.”

163. A proposed Commission Order is attached as Exhibit “A.”

Respectfully submitted,

/s/ Glenn C. Kenton

Glenn C. Kenton
Hearing Examiner